

§ 749.3 Special Order Relating to the Incidental Take of Longfin Smelt
(*Spirinchus thaleichthys*) During Candidacy Period

The Commission finds that, based on current knowledge and the protection and management efforts outlined in this regulation, including Exhibits A through E, the level of habitat loss and take of longfin smelt which is likely to occur during the period that this regulation is in effect will not cause an appreciable reduction in the species' ability to survive and reproduce.

(a) Take Authorization

(1) Research and Monitoring

- (A) Take of longfin smelt by Department personnel in the course of research and monitoring is authorized pursuant to Section 783.1(c), Title 14, CCR.
- (B) Take of longfin smelt in the course of research and monitoring by public agencies and private parties is authorized subject to the following:
 - 1. For ongoing research, a written, detailed project proposal describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the Regional Manager of the Bay Delta Region at the address specified in subsection (4) below within 45 days of this regulation becoming effective.
 - 2. For research which has not yet commenced, a written, detailed project proposal describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the Regional Manager at the address specified in subsection (4) below.
 - 3. The research or monitoring may commence once the Department issues written concurrence that the research and monitoring activities conducted are consistent with the Department's research and monitoring programs and are sufficient to protect longfin smelt. The Department may specify additional terms and conditions for the protection of longfin smelt and the reporting of all data collected to the Department.
 - 4. Regional Manager, Bay Delta Region, P.O. Box 47, Yountville, CA 94599 -- (707) 944-5500.
- (C) Notwithstanding the foregoing, at the discretion of the Department, research and monitoring activities not addressed by the above procedures may receive separate authorizations for take of longfin smelt pursuant to Fish and Game Code Section 2081.

(2) Dredging and Extraction of Sand or Gravel Resources

Take of longfin smelt incidental to otherwise lawful dredging or extraction of sand or gravel resources in a stream or river is authorized for the longfin smelt candidacy period provided that any activity already required to monitor and report the take of any fish species to the Department or a federal wildlife agency also include the following information: the date, location and number of any longfin smelt taken during the candidacy period. A copy of the report shall be mailed to: Regional Manager, Bay Delta Region, P.O. Box 47, Yountville, CA 94599 -- (707) 944-5500.

(3) Local Water Diversions

Incidental take of longfin smelt resulting from diversion of water by any local agency, private party, or the State Water Project North Bay Aqueduct or Suisun Marsh facilities, is authorized during the candidacy period, subject to the following conditions:

- (A) Existing unscreened diversions may continue in operation through the candidacy period. Upon any future determination by the commission that longfin smelt shall be added to the list of threatened or endangered species, incidental take for such diversions must be authorized under Fish and Game Code Section 2081(b) or, if longfin smelt become listed pursuant to Section 1533 of Title 16 of the United States Code, be determined exempt from the permitting requirement under Fish and Game Code Section 2080.1.
- (B) Diversions approved and constructed after the effective date of this section shall be screened and shall use the Department of Fish and Game Fish Screening Criteria for delta smelt (*Hypomesus transpacificus*) in Exhibit A as the fish screening criteria for longfin smelt.
- (C) Existing fish screens that are repaired, upgraded, or reconstructed during the candidacy period must screen for longfin smelt by meeting the Department of Fish and Game Fish Screening Criteria for delta smelt in Exhibit A.
- (D) Any activity already required to monitor and report the take of any fish species to the Department or a federal wildlife agency shall also include the following information: the date, location and number of any longfin smelt taken during the candidacy period. A copy of the report shall be mailed to: Regional Manager, Bay Delta Region, P.O. Box 47, Yountville, CA 94599 -- (707) 944-5500.

(4) State Water Project and Federal Central Valley Project Export Facilities

In *Natural Resources Defense Council v. Kempthorne* (Kempthorne), the United States Eastern District Court issued an Interim Remedial Order Following Summary Judgment and Evidentiary Hearing which required

specific limitations on the joint operations of the State Water Project (SWP) and the Federal Central Valley Project (CVP) in order to prevent the extinction of delta smelt until a new delta smelt biological opinion is issued by the United States Fish and Wildlife Service (FWS). The court has directed FWS to issue its new opinion by September 15, 2008. When the new biological opinion is issued, the *Kempthorne* requirements will terminate. The *Kempthorne* requirements are triggered by environmental conditions and the presence of specific delta smelt life stages and are focused on minimizing the negative entrainment effects caused when the combined export pumping of the SWP, operated by the Department of Water Resources (DWR) and the CVP, operated by the U.S. Department of the Interior, Bureau of Reclamation (Reclamation) reverses the flow in Old and Middle River (OMR). A series of *Kempthorne* OMR flow requirements began in late-December 2007 and will continue until June 20, 2008, sequentially targeting adult delta smelt during migration prior to spawning, spawning delta smelt, larvae and juveniles.

The Commission recognizes that there are statistical correlations between negative OMR flows and take of different longfin smelt life stages, as there are for delta smelt. There is substantial overlap in the periods when the two species are taken by the SWP and CVP. However, adult longfin smelt can be taken a month or more earlier than delta smelt (potentially in December). Because longfin smelt typically spawn earlier, the larvae may be present earlier as well (potentially in February). Consequently, concurrent take of both delta smelt and longfin smelt may include different life stages and magnitudes and *Kempthorne* requirements keyed to delta smelt presence may not match longfin smelt timing. The following measures will protect longfin smelt during the candidacy period when OMR limits required under *Kempthorne* for delta smelt may not be in effect or adequately protective. The Commission therefore authorizes take of longfin smelt incidental to the coordinated operations of the SWP and CVP export facilities in accordance with the following OMR limits, or the OMR limits set in *Kempthorne*, whichever are more protective:

- (A) Monitoring for the presence of adult (≥ 85 mm Fork Length (FL)) and larval longfin smelt (< 20 mmFL) shall be achieved as follows:
1. For adults by standard field sampling intervals, methods and locations of the Fall Midwater Trawl Survey, the San Francisco Bay Study Survey and the Spring Kodiak Trawl Survey.
 2. For larvae, by initiating the 20mm Survey beginning in the first two weeks of March and conducting single tows at sampling locations 405, 411, 418, 602, 501, 504, 519, 508, 513, 520, 703, 704, 706, 707, 711, 716, 705, 801, 802, 804, 809, 812, 815, 901, 902, 906, 910, 912, 914, 915, 918, 919; In the last two weeks in March the full 20mm Survey will begin using standard survey protocol, sampling three tows per sampling location at all 41 standard locations.

3. DWR and Reclamation shall ensure that smelt collected at the SWP and the CVP, respectively, are preserved in formalin or ethanol, labeled with the date and location of collection, and transferred to the Department's Bay-Delta Region Stockton office, 4001 N Wilson Way, Stockton, CA 92405, within two business days to the attention of Marty Gingras for a determination of sex and reproductive status (i.e., egg stage or spent). Identification of any larval longfin smelt collected at either facility shall be reported within one business day to Marty Gingras at the Department's Bay-Delta Region Stockton office.
- (B) Commencing on the effective date of this regulation, DWR and Reclamation shall protect spawning, larval, and juvenile longfin smelt by jointly operating the CVP and SWP to achieve a daily average net upstream (reverse) OMR flow (as computed for *Kemphorne* compliance) between 750 and 5,000 cfs on a seven-day running average beginning when longfin smelt spawning is indicated by: (i) the presence of spent female longfin smelt ($\geq 85\text{mm}$ FL) in the Spring Kodiak Trawl (stations 809, 812, 815, 902, 906, 910, 912, 914, 915 on Exhibit B) or in the San Francisco Bay Study Otter Trawl or Midwater Trawl surveys (stations 863, 864, 865 on Exhibit C), all of which are located east or south of Jersey Point in the San Joaquin River, or south Delta channels or at either the SWP or CVP fish salvage facilities or (ii) when larval longfin smelt ($< 20\text{mm}$ FL) are detected in the 20mm Survey (stations 809, 812, 815, 901, 902, 906, 910, 912, 914, 915, 918 on Exhibit D) east or south of Jersey Point in the San Joaquin River or in south Delta channels or at the SWP or CVP fish salvage facility.

The specific biological flow objective within this range shall be set by the Department, after consultation with the FWS, DWR and Reclamation, to be determined on a weekly basis and based upon a Longfin Smelt Risk Assessment Matrix (LSRAM)(Exhibit E) to be refined by the Department in consultation with FWS, DWR, and Reclamation and the best available scientific and commercial information concerning the distribution and status of longfin smelt. The LSRAM is patterned after the Delta Smelt Risk Assessment Matrix only modified to reflect longfin smelt biology and life stages and available information. This action is suspended during any time: (i) the three-day average of flow in the Sacramento River at Freeport exceeds 80,000 cfs and is resumed when the three-day average Delta outflow falls below 40,000 cfs and adult or larval longfin smelt are again detected east or south of Jersey Point as described above, or (ii) the Vernalis Adaptive Management Plan is being implemented (31 days, typically in mid-April to mid-May). This action shall continue until, in the reasonable discretion of the Department, after consultation with the FWS, DWR, and Reclamation, the longfin smelt entrainment risk at each facility is abated, or June 20, 2008 whichever occurs first.

- (C) Notwithstanding the foregoing, this regulation shall not prevent DWR or Reclamation from taking any action in operating the projects that is reasonably necessary to protect human health or safety of the public, including, but not limited to, any act or omission reasonably necessary to protect the structural integrity of any SWP or CVP facility.
- (D) In the event DWR receives a permit from the Department pursuant to Fish and Game Code Section 2081, which governs the take of longfin smelt, those requirements under Section 749.3(a)(4) which apply to DWR shall be superseded by the terms of such permit.
- (E) This emergency regulation shall be in effect for 180 days. It does not contain measures to protect pre-spawning longfin smelt or their larvae after June 20, 2008 from the effects of project operations, which effects can occur as early as late November or early December 2008. If this regulation is extended, operational requirements for this December – February period may be added by amending this regulation prior to expiration or extension.

NOTE:

Authority cited: Sections 200, 202, 205, 240, and 2084, Fish and Game Code.

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